UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

vs.

LEO MUSE

Defendant.

SENTENCING MEMORANDUM
IND. NO.: 5:05-CR-446

This sentencing memorandum is submitted in addition to the sentencing memorandum submitted on September 17, 2007 (Doc. No. 54.) It is submitted to this Court that a reasonable sentence is this case that is sufficient, but not greater than necessary to achieve the sentencing goals of 18 U.S.C. §3553(a)is time served. The defendant has been incarcerated for 28 months.

In deciding a reasonable sentence that is sufficient but not greater than necessary the Court should consider all the factors under §3553(a).

(1) NATURE AND CIRCUMSTANCE OF OFFENSE

The investigation has revealed that Mr. Muse is a low-level heroin seller who would deal heroin off and on to make money to help support his children. The PSR gives a detailed description of the operation and also concedes that Muse was not living an extravagant lifestyle by any stretch of the imagination and the evidence demonstrated that Muse never made any large profit and would only make a few hundred dollars for the small amounts he dealt with.

(2) HISTORY AND CHARACTERISTICS OF DEFENDANT

The PSR once again gives the specifics of Mr. Muse's family and past employment. Attached and submitted along with this memo are letters from family and friends that show the side of Mr. Muse as a father, son, brother and friend. His children need him and love him and miss him. It is submitted that this loss of loved ones and dependents touches the defendant to the point of remorsefulness and deterrence.

(3) NATURE AND CIRCUMSTANCE OF OFFENSE

It is submitted that Mr. Muse had never served much time in jail before this arrest and that over the past 28 months has learned some valuable lessons and will be deterred from further violating the law as well as a deterrent to others who endeavor to sell heroin.

(4) SENTENCING GUIDELINE RECOMMENDATION

This Court conducted an evidentiary hearing to determine the amount of drugs involved in the conspiracy alleged in the indictment. At the hearing Muse agreed to stipulate that the amount of heroin tallied from wiretap conversations in October, November and December of 2004 and heroin obtained from a search warrant executed in May, 2005 wherein 2.34 grams of heroin was seized was the amount involved in the conspiracy and no more. Muse contends that the government has failed to prove at the hearing that he was responsible for more than 38.34 grams of heroin therefore giving him a guideline range of 20-40 grams or a level 18. Muse contends that his criminal history category is I. (see doc) and with three points for acceptance of responsibility should come out to a level 15 range of 18-24 months.

At the evidentiary hearing the government produced three witnesses who testified they went to New Jersey to bring heroin back for Muse and Hilliard. All three witnesses testified to facts that would make them independent contractors as opposed to being supervised by Muse and Hilliard. More important than their lack of supervision is the fact that Sampson and Edwards repeatedly testified to time frames that pre-dated the conspiracy alleged in the indictment. Further all three witnesses admit to never seeing any money or drugs and guess as to the amounts of each. All three testified pursuant to plea/cooperation agreements without any corroborative evidence whatsoever –

except Hall.

Michael Hall testified that he made three trips during the course of the conspiracy but was so inconsistent with when he went that it is incredible to believe he made more than the one trip that is allegedly corroborated by the phone call on October 12, 2004 between Hall and Hilliard where Hall claims Hilliard gave him permission to open the package and take "one." Hall claims "one" means one bundle but that cannot be certain because the foundation for believing what "one" means is Hall's credibility which it is submitted is thoroughly impeached throughout his testimony.

If the Court credit's Hall's testimony as to the October 12 incident and finds he delivered the package of 20 bricks that equals approximately 40 grams which is the amount that is sold over the wiretap that Muse has already agreed to stipulate to. So, even if Hall is telling the truth it doesn't add to the amount in the conspiracy it merely corroborates where the heroin came from that the government computes was sold after listening on the wiretap from October through December 2004 – and that Muse already agreed to.

The government argues that the amount of drugs testified to outside the scope of the conspiracy should be considered by the court as relevant conduct under the guidelines. Muse objects to this since the quality of evidence is just as weak to prove relevant conduct as to believe amount involved in the conspiracy, merely the uncorroborated word of heroin addicts testifying pursuant to cooperation agreements.

ADJUSTMENT FOR ROLE IN THE OFFENSE

As noted in the original Sentencing Memorandum, there is no credible evidence to support a three point adjustment for Muse being a manager or supervisor of a conspiracy which involved five or more participants. The co-conspirators mentioned in the PSR were not managed or supervised by

Muse and co-defendant Hilliard but rather acted as independent contractors. The evidence relied upon to reach the conclusion that Muse had a supervisory role in the conspiracy was, once again, solely uncorroborated statements from co-conspirators providing substantial assistance with hopes of receiving a more lenient sentence. The wiretap evidence and search warrant evidence do not show supervision or management and two of the witnesses testifying at the hearing repeatedly testified to time frames that pre-dated the conspiracy alleged in the indictment, meaning these statements could not be used to show supervision in the conspiracy even if they were credited. .

MUSE'S CRIMINAL HISTORY

Also as stated in the original memorandum, defendant Muse contends that the probation report is in error by attributing a criminal history point for a July 12, 2002 plea to Unlawful Possession of Marijuana with an unknown docket number, since it is submitted that under §4A1.2(c) the unlawful possession charge of marijuana in new York State is more similar to a minor traffic infraction or public intoxication; the maximum punishment for the unlawful possession of marijuana is a civil fine of $100.00 This is more akin to a speeding ticket than a crime and should not count.

The Introductory Comment to the Criminal History chapter of the sentencing guidelines notes that it deals with "prior criminal behavior." It is submitted that a first Unlawful Possession of Marijuana charge is not criminal behavior in New York State. It must be noted that New York State Penal Law §221 *et seq* makes a clear distinction between "Unlawful Possession of Marijuana" (§221.05) and "Criminal Possession of Marijuana" (PL §221.10 *et seq.*) In passing the Marijuana Reform Act of 1977, the Legislature noted, "The legislature finds that arrests, criminal prosecutions and criminal penalties are inappropriate for people who possess small quantities of marijuana…" (Legislative Findings and Statement of Purposes of L.1977, c. 360, §1 (emphasis added)).

A distinction should be noted that in order to qualify as a "violation" it should be for a Penal Law violation.[1] An Unlawful Possession of Marijuana is not a Penal Law violation until someone commits two Unlawful Possession of Marijuana charges under New York Law. See, Penal Law §221.05. Therefore the Unlawful Possession of Marijuana charge would not be considered a "violation" in the same senses that a "violation" is an offense under the Penal Law. Any Unlawful Possession of Marijuana is a violation of a law that is more akin to a traffic violation which is the most analogous statute to which the Unlawful Possession of Marijuana can be compared.

Since the only other criminal history point is a misdemeanor simple assault in New Jersey almost ten years ago where Muse paid a fine of $180.00, it is submitted that the Criminal History category of 2 overstates the seriousness of Muse's criminal history under the guidelines.

CONCLUSION

When considering all the factors above it is urged that this Court sentence Mr. Muse to time served.

s/Frank Policelli

FRANK POLICELLI, ESQ.

---

1 The fact that it is listed under the Penal Law statutes does not inherently make the charge countable in terms of Criminal History points. Disorderly Conduct, for example, is listed in the Penal Law but is not counted for Criminal History purposes.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

vs.

LEO MUSE

Defendant.

CERTIFICATE OF SERVICE
IND. NO.: 5:05-CR-446

CERTIFICATE OF SERVICE

I, Frank Policelli, hereby certify that on February 4, 2008 I electronically filed the Supplemental Sentencing Memorandum with the Clerk of the District Court using its CM/ECF system, which would then electronically notify the following CM/ECF participant on this case:

Terrence M. Kelly, Esq. Terrence.Kelly@usdoj.gov
Simon K. Moody kmangan@whmblaw.com

DATE: February 4, 2008